

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
SOUTHWESTERN DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GARY L. SMITH

Defendant.

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Case No. 02-5019-CR-SW-RED

ORDER

Now before the Court is Defendant's Motion to Return Movant's Property Seized in Excess of Search Warrant (Doc. 246). After careful consideration, the Court **GRANTS** in part and **DENIES** in part Defendant's Motion (Doc. 246). Pursuant to that ruling, Defendant's Motion to Transport Defendant's Legal Property (Doc. 308) and the Government's Motion to Strike Defendant's "Notice of Additional Property Seized in Excess of Search Warrant Authority" (Doc. 311) are rendered moot and are therefore **DENIED** (Docs. 308 and 311).

The Court held an evidentiary hearing on January 26, 2010. It was adduced at the hearing that the government was willing to return all of Defendant's property listed in Attachment #1 to this order (the "Master List") with exception of (1) a Chevrolet Tahoe, item 41 on the Master List, which Defendant admitted was repossessed by his creditor; (2) the items on Attachment #2, which Defendant admitted were administratively forfeited; and (3) the two items the government cannot find, items 31 and 32 on the Master List.

Denying a 41(g) motion to return property is proper if the government does not possess the property the claimant seeks to be returned. *United States v. White*, 718 F.2d 260, 261 (8th Cir. 1983). Defendant's Motion is **DENIED** to the extent it seeks items 31, 32, and 41 on the Master

List, and the items on Attachment #2 because the government proved it did not have custody of that property.

Defendant's Motion is **GRANTED** to the extent it seeks all other property listed in the Master List, which is listed in Attachment #3. The government shall return the property listed in Attachment #3 to Defendant's designee, Martin Smith within 60 days of the date of this order.

Defendant also submitted a Notice of Additional Property Seized in Excess of Search Warrant Authority (Doc. 294) that included four items from Chicago, IL. The government offered evidence that it never had custody of three of the four items, but that it was willing to return the camera equipment it had, which was listed as item 4 on Defendant's notice. Finding the government does not possess cash, money orders, or safes, which are listed as items 1, 2, and 3 in Defendant's notice, Defendant's Motion is **DENIED** to the extent it seeks that property. Defendant's Motion is **GRANTED** to the extent it seeks camera equipment and other property listed in Attachment #4. The government shall return all property in its possession which is listed in Attachment #4 to Martin Smith within 60 days of the date of this order.

It is also ordered that if the FBI made copies of the contents of the computers that were administratively forfeited, that to the extent those copies do not contain contraband or illegal material, the government shall return them within 60 days of their discovery to Martin Smith.

IT IS SO ORDERED.

DATED: January 28, 2010

/s/ Richard E. Dorr

RICHARD E. DORR, JUDGE
UNITED STATES DISTRICT COURT